(1)

No. 91-201

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT PHILIP SPUDICH, Petitioner,

vs.

SUPERVISOR OF LIQUOR CONTROL
OF THE STATE OF MISSOURI, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the equal protection clause of the Fourteenth Amendment require a rational basis for so-called "non-suspect" classifications contained in state liquor laws, or does it require merely a valid reason for enacting such laws, without regard to considerations of fairness?

2. If there is a fairness requirement, is there any rational basis for those Missouri liquor laws which grant the privilege of Sunday liquor sales to bowling alleys, while forbidding such sales to competing billiard centers, the state having admitted that there is no difference between such establishments other than the presence or absence of the game of bowling?

3. If no factual basis for a distinction is shown by the proponent of the law in question, should the court infer a rational basis by imagining a factual difference unsupported by the record or facts within judicial notice without affording the victim of the classification an opportunity to offer evidence on whether or not the supposed reason is true?

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TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The petitioner Robert Philip Spudich respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on April 29, 1991.

OPINIONS BELOW

The opinion, entered on the same date as the judgment, of the Court of Appeals for the Eighth Circuit (Sneed, C.J.) is reported at 931

F.2d 1278, and is reprinted in the appendix to this petition.

The memorandum decision of the United States District Court for the Western District of Missouri (Wright, D.J.) has not been reported. It is also reprinted in the appendix hereto.

JURISDICTION

The district court had jurisdiction of this case under 28 U.S.C. §1343(3), it being a civil rights action under 42 U.S.C. §1983 and 42 U.S.C. §1988 to redress the deprivation under color of the state law, of appellant's right to equal protection under the Fourteenth Amendment to the U.S. Constitution. On July 16, 1990, the district court denied petitioner's motion for summary judgment and granted respondent's motion for summary judgment.

On petitioner's appeal to the Eighth Circuit Court of Appeals under 28 U.S.C. §1291, the Eighth Circuit entered a judgment and opinion on April 29, 1991 affirming the district court's decision. No petition for rehearing was filed.

Jurisdiction to review the judgment of the Eighth Circuit Court of Appeals by writ of certiorari is conferred upon this court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amendment XIV

§1. Citizenship rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Missouri Revised Statues

§311.050 License required. -- It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as defined in section 311.020, in any quantity, without taking out a license.

§311.098 Amusement places, Sunday sales, when, limitation -- amusement place defined 1. Notwithstanding any other provisions of this chapter to the contrary, any person who possesses the qualifications required by this chapter, and who now or hereafter meets the requirements of and complies with the provisions of this

chapter, may apply for, and the supervisor of liquor control may issue, a license to sell intoxicating liquor, as in this chapter defined, between the hours of 1:00 p.m. and midnight on Sunday by the drink at retail for consumption on the premises of any amusement place as described in the application. As used in this section the term "amusement place" means any establishment whose business building contains a square footage of at least ten thousand square feet, and where games of skill commonly known as bowling or soccer are usually played, and which has annual gross receipts of at least two hundred thousand dollars of which no more than fifty percent may be derived from the sale of alcoholic beverages. [Emphases added.]

STATEMENT OF THE CASE

This is a civil rights action filed on June 29, 1989 by petitioner Robert Philip Spudich under 42 U.S.C. §1983. Mr. Spudich sued Charles E. Smarr, the supervisor of liquor control of the state of Missouri, in the United States District Court for the Western District of Missouri to enjoin enforcement of §311.098, R.S.Mo. (1986), a provision of the Missouri Liquor Control Law which grants the privilege of Sunday liquor licenses to places of amusement, but defines "places of amusement" to include only those places where bowling or soccer is played.

Mr. Spudich owns and operates a billiard center in Springfield, Missouri. A billiard center is larger and more diverse in its activities than the traditional "pool hall." Details as to the nature of the operation are set out

hereafter. At this point, however, it is important to note that billiard centers are direct competitors of bowling alleys. In fact many bowling alleys now contain billiard rooms.

By another provision of the Liquor Control Law of Missouri, 311.050, R.S.Mo., the privilege of liquor sales is denied to all who do not have a license, and therefore Sunday liquor sales are denied to Mr. Spudich and operators of other places of amusement.

As a result of the "bowling alley privilege" created by §311.098, many of Mr. Spudich's customers are going to bowling alleys to play pool on Sundays, instead of to the billiard center, so they can have alcoholic beverages while they play. Therefore, the Missouri General Assembly has, by enacting §311.098, granted a valuable privilege to Mr. Spudich's competitors while denying it to him, solely on the basis of whether a certain game (bowling) is played on the premises.

Mr. Spudich's complaint in the district court prayed for an injunction and declaratory judgment striking that part of the definitional portion of §311.098 which refers to specific games, or, in the alternative, the entire provision, as violative of equal protection. Plaintiff also sought an award of attorney's fees under 42 U.S.C. §1988.

Before filing his suit, Mr. Spudich applied for a Sunday liquor license under §311.098 on the basis of his status as operator of a place of amusement. Respondent denied the license on

the ground that the billiard center does not offer its patrons the game of bowling.

On July 26, 1989, the supervisor of liquor control filed his answer denying various allegations of the complaint, but offering no factual basis for a distinction in the law based upon whether or not bowling is played on the premises.

On May 14, 1990, the supervisor of liquor control filed a motion for summary judgment with no supporting affidavit.

On June 14, 1990, plaintiff filed a motion for summary judgment with a supporting affidavit. No counter-affidavit was filed by the supervisor of liquor control.

On July 16, 1990, the trial court (Wright, D.J.), entered orders granting the supervisor's motion for summary judgment and denying the one filed by Mr. Spudich.

On July 31, 1990, Mr. Spudich filed a notice of appeal to the Eighth Circuit, and on April 29, 1990, the Eighth Circuit Court of Appeals (Sneed, C.J.) affirmed the judgment of the district court.

The following are among the undisputed facts established by plaintiff's uncontradicted affidavit filed with the trial court in support of petitioner's motion for summary judgment.

Petitioner, Robert Philip Spudich, is a citizen of the United States and a resident of Boone County, Missouri. He is the sole owner

and operator of a business establishment in Springfield, Missouri known as Billiards of Springfield. This business has been in existence since 1985. It contains 23 billiard tables and seven coin-operated amusement machines.

The primary business activities of Billiards of Springfield include billiard playing by customers, the sale of food and beverages for consumption on the premises, the sale and repair of billiard equipment, and the playing by customers of coin-operated amusement machines. Billiards of Springfield offers league play accommodating billiard leagues for players equal in number to, or greater than, the average bowling alley in the area.

The recreational game of billiards and coin-operated amusement machines are a major part of the business of Billiards of Springfield, accounting for approximately one-third of its income.

Respondent Charles E. Smarr is the supervisor of liquor control of the state of Missouri, and is charged with the duty of enforcing the Missouri Liquor Control Law, which includes the statute in question.

Mr. Spudich possesses the general personal qualifications to hold a liquor license under the Missouri Liquor Control Law. He has never been convicted of a crime and he does not permit illegal activities to take place on any of his business premises.

Except for the lack of bowling and soccer, Billiards of Springfield qualifies for a Sunday liquor license under the language of §311.098, R.S.Mo. since the owner is personally qualified to hold a liquor license; his building contains more than 10,000 square feet; the annual gross receipts of the business exceeds $200,000.00; the percentage attributable to the sale of alcoholic beverages is less than 50%, and the place is one which would generally be regarded as an amusement place since recreational games are a major part of the business activity which occurs there.

Billiards of Springfield does not qualify under any provision other than §311.098 of the Missouri Liquor Control Law for a Sunday license.

As a result of the aforesaid bowling alley privilege, petitioner has been placed at a competitive disadvantage due to the following facts:

(a) There are five bowling alleys in Springfield, Missouri which compete with Billiards of Springfield. Three of those bowling alleys have Sunday liquor licenses issued under §311.098 and do not qualify for such a license under any other provision of the Missouri Liquor Control Law. All three are open for business and sell liquor by the drink on Sundays. Two of the three that sell liquor on Sundays also offer their patrons the game of billiards and the opportunity to play coin-operated amusement machines.

(b) The bowling alley privilege gives Mr. Spudich's competitors a substantially greater opportunity to earn income and profits by selling liquor during times forbidden to him.

(c) It also causes him to permanently lose customers who are diverted away from his business and attracted to bowling alleys offering liquor on Sundays. This diversion results in the loss of sales in all other areas of his business, including food, beverages, billiards, coin-operated amusements, repairs and sales of billiard equipment.

(d) Several bowling alleys in the market area served by Billiards of Springfield offer billiards in addition to bowling. As a result, a substantial number of Mr. Spudich's customers are going to bowling alleys to play billiards on Sunday so they can have drinks while they play.

In a recent Sunday visit to Battlefield Lanes in Springfield, Mr. Spudich personally observed four of his customers playing billiards in the brief time that he was there. At Walnut Bowl Lanes, he recently observed two of his customers bowling on Sunday at the time he arrived.

There is no difference relating to the Sunday sale of liquor between bowling and billiards. Both are games of skill.

Mr. Spudich has been engaged in the business of operating a recreation center offering billiards for 17 years. He worked in a bowling alley for three years during high school. He is familiar with both bowling and billiards, and he

is unaware of any factual basis for a distinction between them.

Mr. Spudich's other business -- the Columbia Billiard Center, in Columbia, Missouri, which the Missouri Supreme Court held in Spudich v. Director of Revenue, 745 S.W. 2d 677 (Mo. 1988)to be a "place of amusement" -- has been in existence since 1973. It contains 13 billiard tables and seven coin-operated amusement machines, and is essentially the same as Billiards of Springfield, except that the Columbia Billiard Center sells a slightly larger percentage of food and beverages, which qualifies it for a "restaurant bar" Sunday liquor license under another statute.

During the time period since Mr. Spudich lost his Sunday liquor license for Billiards of Springfield, he maintained a Sunday liquor license for Columbia Billiard Center as a "restaurant bar," and during said time his revenues from the Columbia operation increased, in contrast to the revenues from the operation in Springfield, which declined. During the ten months immediately following the date on which he lost his Sunday liquor license (at the end of June, 1989), his gross sales at Billiards of Springfield decreased by $26,330.00 (8.5%) compared to the same ten-month period in the preceding year. At the same time, his gross sales for the Columbia Billiard Center increased $69,790.00 (28.6%), compared to the same ten-month period in the preceding year. He would have expected a similar increase for his Springfield business due to the current increase in the popularity of billiards across the country. He believes the difference is, in

large part, attributable to the loss of the Sunday liquor license of Billiards of Springfield.

Petitioner has incurred necessary and reasonable attorney's fees in the prosecution of this proceeding. A copy of an itemized statement of work done, time spent and charges made prior to initiation of this appeal was submitted to the district court by way of an attachment to Mr. Spudich's aforesaid affidavit. An itemized statement of work done since then will be provided at such time as this court may direct.

REASONS FOR GRANTING THE WRIT

The deleterious manner in which the lower courts are applying the Fourteenth Amendment "rational basis test" in the area of commercial discrimination is causing needless and protracted litigation. The particular problem is well-illustrated by the decisions in the courts below in this case.

Attorneys reading the pronouncements of this court declaring that at least some rational basis is required for classifications even in the commercial area, are encouraged to sue to challenge laws which discriminate against their clients, when such laws are wholly irrational and arbitrary. The courts, however, as will be demonstrated hereafter, will in all likelihood merely pretend to apply a rational basis standard, but will actually, simply fabricate a supposed rational basis, after the trial is over, thereby denying the plaintiff an opportunity to litigate the factual issue.

The authoritative voice of this court is needed to show the lower courts a just and reasonable way of addressing these cases.

Traditional Equal Protection: The Concept of Fairness

> Equality consists in the same treatment of similar persons.
>
> -- Aristotle, Politics

The 14th Amendment to the United States Constitution provides that no state may deny to any person within its jurisdiction the equal protection of the laws. The nature of that guaranty is at the heart of the issue in this case.

The following statement regarding its traditional nature appears at 16A Am.Jur.2d CONSTITUTIONAL LAW §738 (1979).

> The guiding principle most often stated by the courts is that the constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

Note 57 under that statement declares "The decisions supporting this proposition are virtually limitless in number. The following is a small sampling." 40 cases are cited. The first are: Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 81 L.Ed. 1223, 57 S.Ct. 838. Old Dearborn Distributing

Co. v. Seagram-Distillers Corp., 299 U.S. 183, 81 L.Ed. 109, 57 S.Ct. 139. Colgate v. Harvey, 296 U.S. 404, 80 L.Ed. 299, 56 S.Ct. 252, 102 A.L.R. 54. State Board of Tax Comrs. v. Jackson, 283 U.S. 527, 75 L.Ed. 1248, 51 S.Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536. Corporation Com. of Oklahoma v. Lowe, 281 U.S. 431, 74 L.Ed. 945, 50 S.Ct. 397.

At 16A Am.Jur.2d CONSTITUTIONAL LAW §760 (1979) the following statement appears:

> The contention that a state statute violates the constitutional guaranty of the equal protection of the laws is to be tested by considering whether there is a proper basis for the classification made by the statute. The question always is whether there is any reasonable ground for a classification or whether it is only and simply arbitrary, based upon no real distinction. The authorities are unanimous in their conclusion that the basis on which a classification may validly rest must be reasonable and founded on material differences and substantial distinctions which bear a proper relation to the matters or persons dealt with by the legislation and to the purpose sought to be accomplished.

The traditional fundamental concept of equal protection, therefore, is fairness. Finley v. California, 222 U.S. 28, 56 L.Ed. 75, 32 S.Ct. 13. Nicol v. Ames, 173 U.S. 509, 43 L.Ed. 786, 19 S.Ct. 522. In essence it requires that citizens similarly situated should be

treated the same. Differing treatment requires a reason.

Why The States' Power to Regulate Liquor Is not an Issue

Mr. Spudich does not contend he has a constitutionally protected right to sell liquor. He acknowledges that the Twenty-First Amendment gives the states the power to ban liquor completely. It follows, a fortiori, that states have the lesser, included power to regulate the times, places and circumstances under which liquor may be sold. New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S. Ct. 2599, 69 L.Ed.2d 357 (1981). However, Mr. Spudich contends that when states exercise their power to regulate the sale of liquor, equal protection requires them to do so with at least some minimal degree of fairness to their citizens, in other words, having rational bases for the classifications their regulations establish.

It is true that a license to sell liquor is a privilege, not a right. However, where a classification is made for the purpose of conferring a special privilege on a class, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. 16A Am.Jur.2d CONSTITUTIONAL LAW §788 (1979). Distinctions in privileges as well as rights must be based on some reason not applicable to all. Id.

Unequal Levels of Equal Protection

It is ironically true that the equal protection clause is not applied equally to all

U. S. citizens. There appears to be at least three levels of protection that are applied, one to victims of "suspect" classifications, such as race, religion and constitutionally protected rights. Another, less strict standard is applied to other victims of purely economic discrimination. Mr. Spudich does not contend that the discrimination involved here is one of the "suspect" kinds of classifications which would qualify the case for an especially strict or high level of scrutiny.

The classification at bar is a commercial one, and Mr. Spudich is a member of the business community who is a victim of economic discrimination. Therefore, the test of whether this liquor law complies with the requirements of the equal protection clause is the "rational basis" test.

We contend this requires that there be some legitimate reason, related in some way to the Sunday sale of liquor, to confer this special privilege upon bowling alleys while denying it to other, similarly situated places of amusement such as billiard centers. In the area of economic discrimination, differing treatment may not require a compelling reason, but it should require at least some reason. Otherwise, the classification is truly irrational.

The Current Dichotomy: A Rational Basis for What?

Although the cases seem to agree that the applicable equal protection test for economic legislation is the "rational basis" test, the problem is that there are two distinct "rational

basis" tests which the cases apply without mentioning, or seeming to notice, the difference. One requires a reason for the classification; the other, merely a reason for the law.

The more lenient "rational basis" test proceeds along a line of reasoning traditionally associated with substantive due process. The inquiry is simply whether the provision in question reasonably relates to any legitimate state purpose. This test has quietly leaked over into the area of equal protection where, we contend, it does not belong, because it has nothing to do with equality, or fairness, which is at the heart of the traditional concept of equal protection. When this test is used, it is the same as holding that equal protection does not apply to economic legislation, only substantive due process.

Parks vs. Allen, 426 F.2d 610 (5th Cir. 1970) exemplifies the "rational basis for the law" analysis. In that case, plaintiff, an unsuccessful applicant for a liquor license in the City of Atlanta, challenged a city ordinance which caused his application to be denied. The ordinance limited the number of liquor licenses to two to a family. The defendant, City of Atlanta, offered evidence at the trial that prior to the enactment of the subject ordinance, the retail liquor industry in Atlanta was monopolistic. Independent studies indicated that 10 to 15 families controlled 75% of the retail liquor industry in the city, and through monopolistic practices were reaping huge profits. The ordinance under attack was designed to break up existing concentrated control.

The Fifth Circuit Court of Appeals, applying a so-called "rational basis" test, affirmed the judgment of the district court upholding the ordinance. In its conclusions of law the court stated,

> If the ordinance under attack is arguably reasonable, it should be sustained. If, on the other hand, it is wholly without rational basis and is essentially arbitrary, it ought to be voided. See S. H. Kress & Co. v. Johnson, 16 F.Supp. 5 (D.Colo.1936), aff'd 299 U.S. 511, 57 S.Ct. 49, 81 L.Ed. 378 (1936).
>
> Tested on the above principles, there is no hesitancy in concluding that the ordinance in question reasonably relates to the problem sought to be controlled. The evidence adduced on hearing demonstrates this relationship both at the time of the passage and even under the improved conditions existing in the industry today. Certainly, it cannot be said as a matter of law that the ordinances have no rational basis on which to rest. Their enforcement tends to increase competition and lessen the evils described as price discrimination and split deliveries. . . . . Accordingly, the court finds that a rational basis for such ordinances exists and that they constitute a reasonable exercise of the police power by the City of Atlanta.

From the foregoing opinion, the basic elements of a "rational basis for the law" analysis emerge. The first is an actual reason

for the ordinance. In Parks, the reason was that there was a problem in Atlanta with concentrated control, price discrimination and split deliveries, which were detrimental to the public. Secondly, there should be some legitimate state interest served by the measure. In Parks it was an increase in free competition. And finally, there should be a rational relationship between the step taken by the regulation and the object to be achieved (limiting the licenses to two to a family is reasonably calculated to prevent one family from cornering a market area).

It is important to note that Parks did not actually involve an issue of fairness because there was no class of persons discriminated against. The rule limiting a family to two licenses applied equally to all families. It was as fair as could be. The attack on the ordinance was essentially that it is irrational, not that it treated any class of people differently from any other similarly situated.

Therefore, the challenge was essentially on the grounds of substantive due process, and the case reached a correct result because there was in fact a reason for the law. If the court in Parks had tested the ordinance under a traditional "rational basis for the classification" analysis, it could have reached the same result by holding that there simply was no discriminatory classification.

How the Trial Court Misapplied The Rational Basis Test in This Case

One reason Mr. Spudich lost in the district court is that the court applied the "rational basis for the law" test instead of the "rational basis for the classification" test. In his opinion, (Appendix, p.14)Judge Wright stated:

> Where a legislative classification does not interfere with fundamental personal rights and is not based on inherently suspect distinctions, such as race, religion or alienage, it is presumed constitutional and must only be rationally related to a legitimate state interest. City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2516-2517 (1976). This court cannot set aside such legislative discrimination if there is any set of facts reasonably conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105 (1961).
>
> In determining whether state economic legislation is rationally related to a legitimate state interest, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488, 75 S.Ct. 461, 464 (1955).

Also, in his opinion (Appendix p.16), the trial court stated:

Thus . . . this Court's inquiry is two-fold. First, it must determine whether the state of Missouri has a legitimate interest in regulating the sale of intoxicating liquors. If it is found that a legitimate state interest exists, this Court must then determine whether §311.098 is rationally related to that state interest. . . .

[Next follows a discussion of whether the state has power to regulate liquor, which is omitted because it was never an issue in this case inasmuch as plaintiff never challenged or denied such power.]

Finding that the State of Missouri has a legitimate interest in regulating the sale of liquor, this Court must now determine whether §311.098 is rationally related to this interest.

There is no legislative history available to this Court concerning the reasoning of the Missouri legislature in enacting §311.098. Such reasoning, however, can easily be surmised. Section 311.098 is an obvious attempt to address the Missouri legislature's perception of an existing evil: the inability of Missouri's citizens to imbibe alcoholic beverages at amusement places on Sundays. See McGowan, 366 U.S. at 426, 81 S.Ct. at 1105. (Legislature could reasonably find "that some people will prefer alcoholic beverages . . . to add to their relaxation.")

> Thus, under the "rational basis for the law" test, §311.098 can be seen as rational, for it is reasonably calculated to make alcoholic drinks available to some people who want them. The court found reason to grant a liquor license, not reason to discriminate.

This reasoning is tautological. It can be used to sustain almost any imaginable law which has any imaginable purpose, regardless of any discriminatory economic effect. Every law has consequences. One can simply assume that the law's consequences are its ends and proclaim that such results must be what the legislature intended and, since it obviously achieved those consequences, the law is rationally related to that end. This is a test that any law can pass.

In a recent case, however, this court reiterated the point that there must be a reason for the classification, not merely a rational basis for the law. Clark v. Jeter, 100 L.Ed.2d 465, 108 S.Ct. 1910 (1988). In that case, this court set forth three levels of scrutiny. The lowest level still requires that, at a minimum, a statutory classification must be rationally related to a legitimate governmental purpose.

Imagining a Factual Distinction

In this case, the district court made only a passing reference to the concept of the reasonableness of the classification. It appears at page 17 of the appendix where, in its opinion the court stated:

> Moreover, the legislature could reasonably have determined that bowlers, as the statute was originally enacted, and soccer fans, as the statute was amended, are in greater need of liquor on Sundays than those who enjoy other types of amusement.

Likewise, the court of appeals attempted to imagine a rational basis for the classification. At in its opinion (Appendix, p.6), the court stated:

> Alternatively, the legislature reasonably could have believed that billiard parlors, as well as all other activities not described in Missouri Revised Statutes Section 311.098, and not otherwise dealt with specifically in other sections, represented a greater threat of disruptive behavior. Billiards differs from soccer and bowling both in the pace of play and the physical exertion of the players. The pace of the former is fairly slow, while that of the latter is fairly quick. The former requires less physical work by the participants than do soccer and bowling. It reasonably could have been thought that these differences contribute to a more reasonable consumption of alcohol by participants and their audience in the case of soccer and bowling than in billiards.

Although soccer really is not an issue here, one wonders how physical exertion enters into the analysis in view of the fact that it is the soccer fans that are to drink alcoholic beverages, not the players.

One aspect of these decisions that makes them seem so unjust is that these factual assumptions by the courts below are untrue and were asserted for the first time in the courts' opinions. Therefore, the petitioner never had an opportunity to disprove them. "Say first, of God above or man below, / What can we reason but from what we know?" Alexander Pope, An Essay on Man.

Another distressing aspect of this approach to making such decisions is that the judges seem to be "grasping for straws."

While this case was pending in the district court, plaintiff served interrogatories upon defendant asking if defendant knew of any factual basis for a distinction between places where bowling is played and those where only other games of skill are played, and the supervisor of liquor control responded with absolutely no reason or factual basis. Therefore, the supervisor of liquor control, in effect, conceded that there is no reason. Likewise, in oral argument in the court of appeals, counsel for the supervisor candidly stated that she knew of no factual basis for a distinction.

It is difficult to conceive of a basis upon which the legislature could "reasonably" conclude that bowlers are in greater need of alcohol on Sundays than those who enjoy other types of amusement, or facts which would permit a reasonable assumption that there is a greater threat of disruptive behavior in the presence of every game except bowling or soccer.

To conclude that the legislature determined that bowlers need liquor on Sundays more than those who enjoy other games requires nothing less than a flight of fancy. There is no factual basis for that conclusion on the part of the trial court, either in the evidence contained in plaintiff's affidavit or in common experience of which the court might take judicial notice. In fact such a conclusion is contrary to the facts set forth in plaintiff's uncontradicted affidavit in support of his motion for summary judgment, wherein he stated under oath in paragraphs 16, 17 and 18 that billiard centers serve the same clientele as bowling alleys, and that there is no difference relating to the Sunday sale of liquor between bowling and billiards.

Why This Court's Voice Should be Heard

Statements such as those made by the courts below promote continuous and protracted litigation by causing litigants to feel that their rights have been cavalierly dismissed. The petitioner seeks redress in this court to find out whether there really is any such thing as equal protection for the general population. He feels compelled to pursue the matter, until a reason for the discrimination is supplied, or the court candidly rules that no reason for the classification (no fairness) is actually required.

Too often, when the lower courts are presented with classifications that are wholly arbitrary, they have simply imagined reasons, after the trial is over, which are untrue. This procedure is guaranteed to offend the people,

and to erode the esteem heretofore generally accorded to the American judicial system. We submit it would be better either to state simply that fairness is not required, or else to follow through on the articulated principles and strike down truly irrational classifications.

The lower courts, therefore, need some guidance from this court on how to apply the equal protection clause in situations such as this one.

In truth, §311.098 is a product of special interest lobbying. It wholly fails to pass the "rational basis for the classification" test. Applying traditional equal protection principles of fairness to §311.098, R.S.Mo. (1986) leads clearly to the conclusion that there is no rational reason for the classification it establishes. The statute in question grants and denies liquor licenses based on whether or not a certain game is played. The state obviously has no legitimate interest in promoting bowling and soccer and suppressing all other games of skill, or promoting alcoholic indulgence on Sundays among bowlers and sobriety on Sundays among those who play other games.

Therefore, this case is a perfect opportunity for this court to establish what the courts should do when presented with a case where there is clearly no reason for the classification contained in the challenged statute.

The Step-by-Step Principle Distinguished

We anticipate that an argument might be made that, as the trial court stated, the state

can remedy problems, such as the need for alcoholic refreshments, one step at a time. It should also be mentioned, therefore, that §311.098 cannot be justified on the ground that it represents one step in a piecemeal attempt by the state to address a larger problem. By inference from the statute in question, that "problem" would have to be a widespread need for alcoholic beverages among thirsty Sunday players of games of skill in places of amusement.

The "piecemeal" argument is spurious in this case. By enacting §311.098, the legislature was not addressing a problem of excessive sobriety among Sunday players of games of skill. Rather, the legislature was merely conferring a privilege of Sunday liquor sales on a preferred class of amusement places, without any legitimate reason for the resulting discrimination.

Mr. Spudich and many other members of the business community are hopeful that this court will see fit to protect our constitutional right to the fundamental fairness which has heretofore been found in the equal protection clause. To do otherwise will destroy equal protection for most of us.

The "rational basis for the law" test now being applied by many courts will leave many of us at the mercy of any preferential special interest law which might be sold to state legislatures, no matter how unfair, for which some fanciful reason might be imagined. By supplying imaginary, untrue reasons to support such laws, the courts will become unwitting accomplices to those injustices.

Severability

We turn now to the question of severability. At 16 Am.Jur.2d CONSTITUTIONAL LAW §262 (1979), it is stated with regard to this issue:

> The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable, so that some stand while others fall. . . .
>
> It has been said that the test is not whether they are contained in the same section, since the division of a statute into sections is frequently artificial, but whether the valid and invalid sections are inseparably connected in substance, and whether after eliminating the invalid parts, sufficient remains to carry out the legislative intent.

Since Mr. Spudich wishes to have a Sunday liquor license, he would prefer that this court, if it finds that it can do so, strike only the unconstitutional portion of the section and let the remainder stand. Mr. Spudich suggests that this can be done by striking only the definitional reference in §311.098 to the specific games of bowling and soccer, which is what makes it irrational, so that the licenses may be issued to all places where any games of skill are played, if they also meet the size and revenue requirements.

However, if the court finds that it cannot sever the specific references to bowling and soccer, Mr. Spudich prays that the court strike

down the entire statute in order to at least eliminate the unfairness of it.

Attorney's Fees

42 U.S.C. §1988 provides that in any action to enforce a provision of, inter alia, 42 U.S.C. §1983, the court may allow the prevailing party attorney's fee as part of the costs. This case clearly comes within the purview of that section. Counsel for petitioner will provide a statement of fees when directed to do so.

CONCLUSION

If this court finds that equal protection requires a rational basis for classifications in economic legislation, petitioner prays that this court reverse the orders of the courts below and strike the discriminatory definitional portion of §311.098 R.S.Mo., or the entire section, and tax legal fees and costs to the state of Missouri through the supervisor of liquor control.

Respectfully submitted,

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Columbia, Missouri 65203
(314) 443-7000
Counsel of Record and
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2280WPM

Robert Philip Spudich, Appellant, v. Charles E. Smarr, Supervisor, Division of Liquor Control for the State of Missouri, Appellee.	*	Appeal from the United States District Court for the Western District of Missouri.

Submitted: March 13, 1991
Filed: April 29, 1991

Before: FAGG, SNEED, and LOKEN, Circuit Judges.

SNEED, Circuit Judge:

This case involves whether Missouri Revised Statutes Section 311.098 violates the equal

SNEED, Circuit Judge:

This case involves whether Missouri Revised Statutes Section 311.098 violates the equal protection clause of the Fourteenth Amendment.

I.

Facts and Proceedings Below

Appellant, Robert Spudich, is the owner and operator of a business establishment in Springfield, Missouri, known as Billiards of Springfield. He applied for a Sunday liquor license under Missouri Revised Statutes Section 311.098, which provides in pertinent part:

> [A]ny person who possesses the qualifications required by this chapter, and who now or hereafter meets the requirements of and complies with the provisions of this chapter, may apply for, and the supervisor of liquor control may issue, a license to sell intoxicating liquor, as in this chapter defined, between the hours of 1:00 p.m. and midnight on Sunday by the drink at retail for consumption on the premises of any amusement place as described in the application. As used in this section the term "amusement place" means any establishment whose business building contains a square footage of at least ten thousand square feet, and where games of skill commonly known as bowling or soccer are usually played, and which has annual gross receipts of at least two hundred thousand dollars of which no more than fifty percent may be derived from the sale of alco-

holic beverages.

Mo. Ann. Stat. § 311.098 (Vernon Supp. 1991) (emphasis added).

Appellant's business establishment meets all of the requirements of an "amusement place" except that neither bowling nor soccer are played there. Accordingly, his request for a liquor license was denied by the Missouri Division for Liquor Control.

On June 30, 1989, Spudich filed a civil rights action under 42 U.S.C. §§ 1983 and 1984 against Charles Smarr, the Supervisor of Liquor Control of the State of Missouri, to enjoin enforcement of section 311.098 by Smarr. Spudich asserted that the statute under which Smarr purports to act violates the equal protection clause of the Fourteenth Amendment. In his complaint, Spudich claims that there are bowling alleys which compete with his business that have obtained Sunday liquor licenses. Spudich also claims that some of these bowling alleys offer games of billiards. Lastly, Spudich contends that these bowling alleys are attracting his customers on Sundays because they are able to sell liquor.

On July 16, 1990 the district court granted Smarr's motion for summary judgment. The district court held that Missouri Revised Statute Sections 311.098 does not violate the equal protection clause of the Fourteenth Amendment.

Spudich appeals the decision of the district court. This court has jurisdiction to

hear this appeal under 28 U.S.C. § 1291 (1988).

II.

Standard for Summary Judgment

When reviewing the district court's entry of summary judgment, we apply the same standard the district court used in granting the motion for summary judgment. See Jewson v. Mayo Clinic, 691 F.2d 405, 408 (8th Cir. 1982). Under Federal Rule of Civil Procedure 56(c), the motion for summary judgment should be sustained "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In performing the analysis under Rule 56(c), we are required to view all facts in the light most favorable to the nonmoving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. See Robinson v. Monaghan, 864 F.2d 622, 624 (8th Cir. 1989).

III.

Discussion

Section 311.098 is an economic regulation that is concerned with control of the liquor business in the state of Missouri. The statutory classification does not interfere with fundamental rights and is not based on a suspect class. As such, the classification is presumed constitutional, and it need only be rationally related to a legitimate state interest. See New

Orleans v. Dukes, 427 U.S. 297, 303 (1976); Carolan v. City of Kansas City, Missouri 813 F.2d 178, 181-82 (8th Cir. 1987).

There is an added presumption in favor of the validity of state regulation in the area of liquor control. See California v. LaRue, 409 U.S. 109, 118-19 (1972). A state has broad power to regulate the times, places, and circumstances under which it will permit the sale of liquor. See New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715 (1981) (per curiam). Although this power is not absolute, see Craig v. Boren, 429 U.S. 190, 210 (1976) (holding that an Oklahoma statute, which forbade the sale of 3.2% beer to females under the age of eighteen and to males under the age of twenty-one, violated the equal protection clause), a state's power to regulate the liquor industry "allows the widest discretion and is subject to minimal demands of the Fourteenth Amendment's due process and equal protection requirements." Parks v. Allen, 426 F.2d 610, 613 (5th Cir. 1970).

The Missouri legislature's interest in enacting a scheme of liquor control laws is to protect the health and safety of Missouri citizens while also providing for appropriate recreational enjoyment. Based upon Missouri's broad power to regulate when and where liquor is old, this is clearly a legitimate interest. See e.g. U.S. Const. amend. XXI, § 2; New York State Liquor Auth., 452 U.S. at 715; Craig, 429 U.S. at 205-06. Consequently, the only question that this court must answer is whether the classification created by section 311.098 is rationally related to this purpose.

A statutory classification does not offend the Fourteenth Amendment unless it rests on grounds "wholly irrelevant" to the achievement of the state's objective. See McGowan v. Maryland, 366 U.S. 420, 425 (1961). "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." Id. at 425-26.

There is no legislative history available to this court concerning the reasoning of the Missouri legislature in enacting section 311.098. However, we cannot set aside a legislative classification within the context of liquor regulation if there is any set of facts that can reasonably be conceived to justify it. Id. at 426. We hold that such reasons are present in this case. The legislature may reasonably have believed that allowing the sale of liquor at certain family-oriented sports facilities, such as bowling alleys and soccer stadiums, would provide a relaxing atmosphere that would enhance the recreational aspect of the day without significantly increasing the threat of disruptive activity in the community.

Alternatively, the legislature could reasonably have believed that billiard parlors, as well as all other activities not described in Missouri Revised Statutes Section 311.098, and not otherwise dealt with specifically in other sections, represented a greater threat of disruptive behavior. Billiards differs from soccer and bowling both in the pace of play and the physical exertion of the players. The pace of the former is fairly slow, while that of the latter two is fairly quick. The former requires

less physical work by the participants than do soccer and bowling. It reasonably could have been thought that these differences contribute to a more reasonable consumption of alcohol by participants and their audience in the case of soccer and bowling than in billiards. We hasten to add that the record reveals no specific reason for the distinction that the statute draws between soccer and bowling, on the one hand, and billiards, on the other.

The appellant alleges that some bowling alleys that serve liquor on Sunday also have billiard tables on the premises. We do not know the relative size of these two activities in the instances in which they exist. We can only observe that one bowling alley along side a space of nine thousand square feet of billiard tables is not a bowling alley. Likewise, nine thousand square feet of bowling alleys and one billiard table is not a billiard parlor. At some point the character of a place will change for the purposes of section 311.098 as the relationships of the portions of its activities is altered. However, the record in this case does not present that kind of issue.

Accordingly, we find that section 311.098 creates a classification that furthers a legitimate state interest.

AFFIRMED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

ROBERT PHILIP SPUDICH

V. **JUDGMENT IN A CIVIL CASE**

CHARLES E. SMARR Case No. 89-4285-CV-C-5

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

- that defendant's motion for summary judgment is granted.

- that plaintiff's motion for summary judgment is denied.

ENTERED: July 16, 1990

July 16, 1990

R.F. Connor
Clerk

By: Jackie Price
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

ROBERT PHILIP SPUDICH,	)	
	)	
Plaintiff,	)	No. 89-4285-CV-C-5
	)	
vs.	)	
	)	
CHARLES E. SMARR,	)	
	)	
Defendant.	)	

ORDER

Before this Court is defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment. Plaintiff challenges the constitutional validity of a Missouri statute authorizing the licensing of certain "amusement places" to sell intoxicating liquor on Sundays. Defendant is the Supervisor of Liquor Control for the State of Missouri. For the following reasons, defendant's motion for summary judgment will be granted and plaintiff's motion for summary judgment will be denied.

Facts

Plaintiff is the owner and operator of a business establishment in Springfield, Missouri, known as Billiards of Springfield. He has applied for a Sunday liquor license under Mo.Rev.Stat. § 311.098, and such application has been denied.

Mo.Rev.Stat. § 311.098 reads in pertinent part:

> Notwithstanding any other provisions of this chapter to the contrary, any person who possesses the qualifications required by this chapter, and who now or hereafter meets the requirements of and complies with the provisions of this chapter, may apply for, and the supervisor of liquor control may issue, a license to sell intoxicating liquor, as in this chapter defined, between the hours of 1:00 p.m. and midnight on Sunday by the drink at retail for consumption on the premises of any amusement place as described in the application. As used in this section the term **"amusement place"** means any establishment whose business building contains a square footage of at least ten thousand square feet, and where games of skill commonly known as bowling or soccer are usually played, and which has annual gross receipts of at least two hundred thousand dollars of which no more than fifty percent may be derived from the sale of alcoholic beverages.

This statute was passed into law in 1983. As originally passed, § 311.098 defined "amusement place" only as a business where games of skill commonly known as bowling are played. In 1984, the legislature amended § 311.098 by adding "or soccer" after "bowling." Mo.Ann.Stat. § 311.098 (Vernon 1990).

Plaintiff's business establishment meets all of the requirements of an "amusement place"

as defined by § 311.098 except that neither bowling nor soccer are played there.

Plaintiff asserts that there are bowling alleys which compete with plaintiff's business that have obtained Sunday liquor licenses pursuant to § 311.098. Plaintiff also contends that some of these bowling alleys also offer games of billiards and that they are attracting plaintiff's customers on Sundays because they are able to sell liquor. For the sake of these motions for summary judgment, this Court will assume these facts to be true.

Standard for Summary Judgment

Fed. R. Civ. P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." City of Mt. Pleasant, Iowa v. Associate Elec. Co-op., 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party has done so, the burden shifts to the non-moving party to go beyond his pleadings and by affidavit or by "depositions, answers to interrogatories, and admissions on file" show that there is a genuine issue of fact to be resolved at trial. Celotex, 477 U.S. at 323, 106 S.Ct. at 2553. Evidence of a disputed factual issue which is merely

colorable or not significantly probative, however, will not prevent entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2511 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact." Hass v. Weiner, 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, this Court must view all facts in a light most favorable to the non-moving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. Robinson v. Monaghan, 864 F.2d 622, 624 (8th Cir. 1989).

If "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," this Court must grant summary judgment. Fed. R. Civ. P. 56(c).

Discussion

Plaintiff contends that Mo.Rev.Stat. § 311.098 violates the equal protection clause of the Fourteenth Amendment to the United States Constitution in that it arbitrarily discriminates against amusement places that do not offer bowling or soccer.

Section 311.098 is concerned with control of the liquor business in the State of Missouri. United States Supreme Court decisions provide clear guidance for this Court's review of such state economic legislation. A federal court "may not sit as a superlegislature to judge the wisdom or desirability of legislative policy

determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . ." City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517 (1976).

Where a legislative classification does not interfere with fundamental personal rights and is not based on inherently suspect distinctions, such as race, religion or alienage, it is presumed constitutional and must only be rationally related to a legitimate state interest. Dukes, 427 U.S. at 303, 96 S.Ct. at 2516-17. This Court cannot set aside such legislative discrimination if there is any set of facts reasonably conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105 (1961).

In determining whether state economic legislation is rationally related to a legitimate state interest, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488, 75 S.Ct. 461, 464 (1955). Moreover, legislatures may perceive that such evils, though in the same field, are of different dimensions or proportions and require different remedies. Williamson, 348 U.S. at 489, 75 S.Ct. at 465. The legislature may address that portion of a problem which appears to it to be most troubling and may attempt to remedy it while neglecting other portions of the problem. Williamson, 348 U.S. at 489, 75 S.Ct. at 465.

A state legislature's broad discretion in

economic legislation is perhaps nowhere more expansive than in concerns under the Twenty-first Amendment. As stated in the Twenty-first Amendment, "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

There is an added presumption in favor of validity of state regulation in the area of liquor control. California v. LaRue, 409 U.S. 109, 118-19, 93 S.Ct. 390, 397 (1972). Not only does a state have the absolute power under the Twenty-first Amendment to totally prohibit the sale of liquor within its boundaries, it has broad power to regulate the times, places and circumstances under which it will permit the sale of liquor. New York State Liquor Authority v. Bellanca, 452 U.S. 714, 715, 101 S.Ct. 2599, 2600 (1981).

The State of Missouri has determined that its liquor statutes are the sole source of legal validity for liquor business within its boundaries. As stated by a Missouri court:

> The liquor business stands on a different plane than other commercial and business operations. It is placed under the ban of the law and is different from all other occupations. No person has an inherent or natural right to engage therein. Those who engage in the business of the sale of liquor have no legal rights except those expressly granted by statute and by license.

Vaughn v. Ems, 744 S.W.2d 542, 547 (Mo.Ct.App. 1988).

As broad as a state's discretion may be in the area of liquor legislation, it is not absolute. The fact that state regulation concerns the liquor business does not isolate the state from the Fourteenth Amendment's requirements of equal protection. California Retail Liquor Dealers Ass'n v. Midcal Alum., 455 U.S. 97, 110, 100 S.Ct. 937, 945 (1980). In Craig v. Boren, for example, the Court struck down on equal protection grounds an Oklahoma statute which forbade the sale of liquor to minors and defined minors as females under the age of eighteen and males under the age of twenty-one. Craig v. Boren, 429 U.S. 190, 210, 97 S.Ct. 451, 463 (1976). In holding this statute unconstitutional, the Court found that "the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment." Craig, 429 U.S. at 204-5, 97 S.Ct. at 461.

Unlike the Oklahoma statute in Craig, the statute at issue in the instant case does not discriminate against suspect classes, nor doe it impinge on fundamental personal rights. Thus, as mentioned above, this Court's inquiry is two-fold. First, it must determine whether the State of Missouri has a legitimate interest in regulating the sale of intoxicating liquors. If it is found that a legitimate state interest exists, this Court must then determine whether § 311.098 is rationally related to that state interest.

Addressing the first issue, it is clear that states have long been found to have the power to regulate the trade of intoxicating liquor within their boundaries. See Craig, 429 U.S. at 205-6, 97 S.Ct. at 461 and cases cited therein. Within a state's police powers are interests in the health and happiness of its citizens. McGowan, 366 U.S. at 426, 81 S.Ct. at 1105. A state's interest in the regulation and control of intoxicating liquors is made explicit by the Twenty-first Amendment.

Finding that the State of Missouri has a legitimate interest in regulating the sale of liquor, this Court must now determine whether § 311.098 is rationally related to this interest.

There is no legislative history available to this Court concerning the reasoning of the Missouri legislature in enacting § 311.098. Such reasoning, however, can easily be surmised. Section 311.098 is an obvious attempt to address the Missouri legislature's perception of an existing evil: the inability of Missouri's citizens to imbibe alcoholic beverages at amusement places on Sundays. See McGowan, 366 U. S. at 426, 81 S.Ct. at 1105 (Legislature could reasonably find "that some people will prefer alcoholic beverages . . . to add to their relaxation.")

Moreover, the legislature could reasonably have determined that bowlers, as the statute was originally enacted, and soccer fans, as the statute was amended, are in greater need of liquor on Sundays than those who enjoy other types of amusement. That the legislature did

not seek a more pervasive remedy by providing a broader definition of "amusement place" does not affect the constitutionality of § 311.098. As noted above, "[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson, 348 U.S. at 489, 75 S.Ct. at 465.

Additionally, the fact that some billiards players are able to take advantage of § 311.098 by playing on tables at bowling alleys is of no constitutional consequence. That a statute be not particularly wise or fair is the concern of the legislature, not the judiciary. Reeder v. Kansas city Board of Police Comm'rs, 796 F.2d 1050, 1055 (8th Cir. 1986). While one might hope that the dearth of liquor available at Missouri amusement places on Sundays will soon be remedied, that task must be left to the Missouri legislature.

As a final note, this Court finds defendant's reliance on Meredith Wilson's The Music Man to be misplaced. There is nothing in the record before this Court, or properly inferable from the record, to suggest that the Missouri legislature's enactment of § 311.098 was in response to concerns of pool hall trouble on Sundays. Section 311.098 is an enabling statute, not prohibiting. It functions to permit the sale of liquor on Sundays in qualifying bowling alleys and soccer stadiums, rather than prohibit its sale elsewhere. Nothing in the language of § 311.0978 suggests that the evil sought to be remedied by the Missouri legislature was the same as concerned the citizens of River City.

For the above reasons, it is hereby

ORDERED that defendant's motion for summary judgment is granted. It is further

ORDERED that plaintiff's motion for summary judgment is denied.

SCOTT O. WRIGHT
United States District
Judge

July 16, 1990